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Zainol @ Zainol Abidin bin Mohamed v Lee Lim Huat

B HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12B-201–07 OF 2014
LIM CHONG FONG JC
21 NOVEMBER 2014

C *Contract — Undue influence — Fiduciary relationship — Major shareholder/director of company ('appellant') gave company's lawyer personal undertaking to pay his fees if land title was released for company to sell the land — Lawyer previously acted for another director of company — Whether fiduciary relationship existed between all parties involved — Whether rebuttable* D *presumption arose appellant unduly influenced by lawyer and other director to give undertaking — Whether transaction unconscionable — Whether lawyer's proper remedy was to submit bill of costs for services rendered and claim same against company*

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The appellant was the major shareholder cum director of a company ('Precise Avenue') for which the respondent, a practising lawyer, had acted in the sale of a piece of the company's land to an individual. The sale did not go through and the respondent did not raise any bill for services rendered. He, however, had F custody of the issue document of title to the land. As Precise Avenue wanted to sell the land urgently on its own, the appellant issued the respondent a personal letter of undertaking to pay him RM200,000 upon the sale of the land if the title was handed over to him. The respondent acceded to the request and the land was sold to a third party. The appellant, however, refused to pay the G promised sum causing the respondent to sue him in the sessions court for breach of the undertaking. The appellant contended the letter of undertaking was given without consideration and that it was procured under economic duress and undue influence. The sessions court allowed the respondent's claim holding, inter alia, that: (a) the consideration for the letter of undertaking was H the respondent's release of the title deed to the appellant and the benefit the latter gained from that act ie the sale of the land by Precise Avenue in which the appellant was the majority shareholder and director; (b) the respondent was entitled to have custody of the title deed as a lien under s 124 of the Contracts Act 1950 so long as his fees for services rendered was unpaid and even though I he had not raised a bill/invoice for services rendered; and (c) the appellant failed to prove the letter of undertaking was given under economic duress or undue influence.

Held, allowing the appeal and setting aside the sessions court's decision:

(1) The appellant had appropriately invoked the defence of undue influence to vitiate the letter of undertaking. On this aspect, the trial judge misdirected herself by failing to ask and consider the right questions on the facts and circumstances of the case. The respondent's proper remedy was to submit a bill of costs and claim for services rendered against Precise Avenue (see paras 27 & 31).

(2) The respondent's fees for legal services rendered to Precise Avenue were not legally due as a debt in the absence of any invoice/bill of costs. There was no justification for any lien over the title to the land. The appellant, albeit educated, would not have been aware of the legal intricacies of whether the respondent had a valid solicitor's lien at the material time. He was influenced by the respondent through Liew Hock Seng (another director of Precise Avenue for whom the respondent had acted previously) that the letter of undertaking was necessary to discharge the 'lien'. It was natural for the appellant to have trusted both of them and resulted in him giving the undertaking to his personal detriment. It was unconscionable by reason that the appellant was misled by the respondent and Liew Hock Seng. In this situation, it was for the respondent to rebut the presumption of undue influence but he failed to do so at the trial (see para 30).

(3) The trial judge failed to appreciate the special relationship between the parties. The respondent was the solicitor for Precise Avenue wherein the appellant was the alter ego. The respondent had earlier acted for Liew Hock Seng, another director of the company. In the circumstances, the respondent was effectively in a position of authority over the appellant besides being in a fiduciary relationship with him. Both Liew Hock Seng and the appellant were in a fiduciary relationship with Precise Avenue and with each other (see para 29).

(4) The court agreed with the trial judge that there was valid consideration for the giving of the letter of undertaking. The respondent's release of the title was the consideration for the appellant's promise as undertaken. The court also agreed the appellant had not sufficiently proven that he was subjected to economic duress when he gave the undertaking letter. The appellant's urgency per se in wanting the issue document of title was not good enough to sustain that defence. He also did not protest at the time he gave the undertaking letter and after having given it, he did not take any step to avoid it save for refusing to pay (see paras 22 & 24).

[Bahasa Malaysia summary

Perayu merupakan pemegang saham utama merangkap pengarah sebuah syarikat ('Precise Avenue') yang mana responden, seorang peguam yang beramal, telah bertindak dalam jualan sebidang tanah syarikat itu kepada seorang individu. Jualan itu tidak berlaku dan responden tidak

mengemukakan apa-apa bil untuk khidmat yang diberikan. Dia, bagaimanapun, mempunyai hak ke atas surat ikatan hak milik kepada tanah itu. Oleh kerana Precise Avenue ingin menjual tanah itu segera dengan sendiri, perayu telah mengemukakan kepada responden sepucuk surat aku janji peribadi untuk membayarnya RM200,000 apabila tanah itu dijual jika hak milik diserahkan kepadanya. Responden bersetuju dengan permintaan itu dan tanah itu dijual kepada pihak ketiga. Perayu, bagaimanapun, enggan membayar jumlah yang dijanjikan sehingga menyebabkan responden menyamannya di mahkamah sesyen kerana melanggar aku janji itu. Perayu berhujah surat aku janji telah diberikan tanpa pertimbangan dan bahawa ia telah diperolehi dalam keadaan ekonomi yang terpaksa dan pengaruh yang tidak wajar. Mahkamah sesyen membenarkan tuntutan responden dengan memutuskan, antara lain, bahawa: (a) pertimbangan untuk surat aku janji itu adalah pelepasan responden untuk surat ikata hak milik itu kepada perayu dan faedahnya yang diperolehi daripada perbuatan tersebut, iaitu jualan tanah oleh Precise Avenue di mana perayu merupakan pemegang saham utama dan pengarah; (b) responden berhak mendapat jagaan surat ikatan hak milik itu sebagai lien di bawah s 124 Akta Kontrak 1950 selagi yuran perkhidmatan yang diberikannya tidak dibayar dan walaupun dia tidak mengemukakan bili/nvois untuk perkhidmatan yang diberikan; dan (c) perayu gagal membuktikan surat aku janji itu telah diberikan di bawah ekonomi terpaksa atau pengaruh yang tidak wajar.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan mahkamah sesyen:

(1) Perayu telah sewajarnya dituntut pembelaan pengaruh tidak wajar untuk melemahkan surat aku janji. Dalam aspek ini, hakim perbicaraan tersalah arah dirinya apabila gagal untuk bertanya dan mempertimbangkan soalan yang tepat kepada fakta dan hal keadaan kes itu. Remedi wajar responden adalah untuk mengemukakan bil kos dan tuntutan bagi perkhidmatan yang diberikan terhadap Precise Avenue (lihat perenggan 31 & 27).

(2) Yuran untuk khidmat guaman responden yang diberikan kepada Precise Avenue tidak dianggap di sisi undang-undang sebagai hutang jika tiada apa-apa invois/bil kos. Tidak ada justifikasi untuk mana-mana lien ke atas hak milik tanah itu. Perayu, walaupun berpendidikan, tidak akan sedar tentang selok-belok undang-undang sama ada responden mempunyai lien peguam cara yang sah pada masa yang material. Dia telah dipengaruhi oleh responden melalui Liew Hock Seng (pengarah lain Precise Avenue yang mana responden telah bertindak untuknya sebelum ini) bahawa surat aku janji itu adalah perlu bagi melepaskan 'lien' itu. Adalah biasa untuk perayu mempercayai kedua-dua mereka dan menyebabkan pemberikan aku janji itu menjejaskan peribadinya. Ia adalah tidak berpatutan oleh sebab perayu telah dikelirukan oleh

responden dan Liew Hock Seng. Dalam keadaan ini, ia adalah untuk responden menyangkal anggapan pengaruh tidak wajar itu tetapi dia gagal berbuat demikian dalam perbicaraan itu (lihat perenggan 30).

(3) Hakim perbicaraan itu telah gagal untuk memahami hubungan istimewa antara pihak-pihak. Responden adalah peguam cara bagi pihak Precise Avenue di mana perayu adalah *alter ego*. Responden terdahulu telah bertindak bagi pihak Liew Hock Seng, pengarah lain syarikat itu. Dalam keadaan itu, responden secara berkesan dalam kedudukan berkuasa ke atas perayu selain mempunyai hubungan fidusiari dengannya. Kedua-dua Liew Hock Seng dan perayu mempunyai hubungan fidusiari dengan Precise Avenue dan antara satu sama lain (lihat perenggan 29).

(4) Mahkamah bersetuju dengan hakim perbicaraan bahawa terdapat pertimbangan sah untuk memberikan surat aku janji. Pelepasan hak responden adalah balasan untuk janjian perayu sepertimana dilaksanakan. Mahkamah juga bersetuju yang perayu tidak membuktikan dengan cukup bahawa dia terdedah kepada ekonomi yang dia tertakluk kepadanya paksaan ekonomi apabila memberi surat aku janji itu. Kesegeraan perayu dengan sendirinya yang mahu dokumen hak milik itu dikeluarkan adalah tidak cukup untuk mengekalkan pembelaan itu. Dia juga tidak membantah pada masa dia memberikan surat aku janji itu dan setelah memberikannya, dia tidak mengambil apa-apa langkah untuk mengelakkannya kecuali untuk enggan membayar (lihat perenggan 22 & 24).]]

Notes

For cases on fiduciary relationship, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7408–7409.

Cases referred to

Bank Pertanian Malaysia Bhd (previously known as Bank Pertanian Malaysia) v Nora'rifah bt Darus [2014] 6 MLJ 870; [2014] 7 CLJ 631, CA (refd)

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004] 1 CLJ 357, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Mohd Fariq Subramaniam v Naza Motor Trading Sdn Bhd [1998] 6 MLJ 193, HC (refd)

OCBC Securities (Melaka) Sdn Bhd (formerly known as Sykt Tan, Chow & Loh Securities Sdn Bhd) v Koh Kee Huat [2004] 2 MLJ 110, HC (refd)

Oh Cheng Lim v Lim Eam Wooi [1988] 2 MLJ 120 (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd & Ors [1996] 1 MLJ 309, CA (refd)

Sea-Land Service Inc v Cheong Fook Chee Vincent [1994] 3 SLR 631, CA (refd)

Shanti Prasad Jain v Director of Enforcement Foreign Exchange Act 1962 AIR 1764, SC (refd)

Legislation referred to

Contracts Act 1950 ss 2, 14, 16, 73, 124
Legal Profession Act 1976 s 124

Lim Choon Khim (SW Chow with him) (Chooi Saw & Lim) for the appellant.
HM Lee (HM Lee) for the respondent.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an appeal against the decision of the learned sessions court judge dated 12 June 2014 after trial allowing the respondent/plaintiff's claim of RM200,000 together with interest and costs.

[2] The respondent/plaintiff's claim against the appellant/defendant was for breach of undertaking given pursuant to a letter of undertaking dated 20 August 2009.

[3] In the grounds of judgment, the learned judge said as follows:

> [9] Mahkamah ini dapati eksibit P2 iaitu surat aku janji bertarikh 20 Ogos 2009 yang di tandatangani olen defendan adalan sah dan boleh dilaksanakan. Defendan sendiri dalam keterangannya tidak menafikan yang beliau telah menandatangani eksibit P2 tersebut.
>
> *[10] Mahkamah ini dapati balasan kepada aku janji defendan ialah plaintif telah melepaskan dokumen keluaran hak milik tanah yang dipegang oleh plaintif kepada defendan dan defendan telah mendapat manfaat dengan melupuskan tanah tersebut kepada pihak ketiga. Defendan adalah pemegang syer utama dan juga salah seorang pengarah dalam syarikat Precise Avenue (M) Sdn Bhd. Hujahan peguam defendan bahawa ketiadaan balasan dalam suatu kontrak apabila defendan tandatangan eksibit P2 tidak dapat diterima oleh mahkamah ini.*
>
> *[11] Mahkamah ini berpendapat apabila defendan menandatangani surat akuanjanji tersebut ianya adalah persetujuan oleh defendan sendiri untuk membayar kepada plaintif jumlah sebanyak RM200,000 selepas pelupusan tanah tersebut.*
>
> [12] Plaintif yang bertindak sebagai peguam cara Precise Avenue (M) Sdn Bhd tidak di bayar fi langsung. Selam beliau bertindak untuk Precise Avenue (M) Sdn Bhd dan mahkamah juga dapati tindakan plaintif memegang dokumen keluaran hak milik tanah Precise Avenue (M) Sdn Bhd adalah wajar di bawah s 124 Akta Kontrak 1950:
>
> > General lien of bankers, factors, wharfingers, advocates and policy brokers.
> >
> > Bankers, factors, wharfingers, advocates and policy brokers may in the absence of a contract to the contrary, retain, as a security for a general balance of account,

any goods bailed to them; but no other persons have to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

[13] Walaupun peguam defendan menghujahkan yang plainitf telah gagal memberikan bil ataupun invois untuk membuktikan yang wujudnya 'a general balance of debt' dan plaintif gagal memaklumkan berapakah jumlah yang benar-benar terhutang oleh Precise Avenue, namun begitu, hujahan tersebut tidak diterima oleh mahkamah ini kerana SP1 dalam keterangannya jelas menyatakan yang menyatakan plaintif mempunyai lien keatas dokumen keluaran hak milik tanah tersebut di bawah s 124 Akta Kontrak untuk mendapat bayaran fi beliau. Ini kerana daripada tarikh 20 Ogos 2004 sehinggalah 20 Ogos 2009 Plaintif tidak dibayar fi langsung. Mahkamah dapati sebagai seorang peguam yang telah melaksanakan tugasnya sudah tentu perlu dibayar fi kepada beliau.

[14] Berkenaan isu defendan telah menandatangani surat aku janji tersebut di bawah paksaan dan pengaruh tidak wajar, mahkamah ini mendapati defendan gagal mengemukakan sebarang bukti wujudnya duress atau pengaruh tidak wajar. Sebagai seorang terpelajar dan seorang pengarah syarikat, defendan mempunyai pilihan untuk tidak menurunkan tandatangannya di atas surat aku janji tersebut.*Berdasarkan keterangan defendan sendiri, mahkamah ini dapati selepas mendapat kembali dokumen keluaran hak milik tanah tersebut defendan telah berjaya menjual tanah tersebut dan menguntungkan Syarikat Precise Avenue di mana defendan adalah seorang pengarah di syarikat tersebut.* Defendan juga adalah penandatangan untuk semua cheque syarikat. Dengan yang demikian, Mahkamah ini dapati tidak wujud paksaan atau pengaruh tidak wajar ketika eksibit P2 ditandatangani. (Emphasis added.)

[4] After reading the written submissions filed by the parties, I heard oral arguments of counsel on 7 November 2014.

SALIENT FACTS

[5] The respondent is a practising advocate and solicitor who has provided legal services to Precise Avenue (M) Sdn Bhd as well as a Liew Hock Seng.

[6] The appellant is a director in Precise Avenue (M) Sdn Bhd. Liew Hock Seng is also a director of Precise Avenue (M) Sdn Bhd.

[7] There was the Shah Alam High Court Civil Suit No MT1-22–468 of 2004 wherein the respondent acted for Liew Hock Seng who was a co-plaintiff against seven defendants that included Precise Avenue (M) Sdn Bhd. On 27 August 2005, the parties recorded a consent order wherein the first defendant there was directed to hand to the respondent here the issue document of title to land HS(D) 70201 PT No 17322 Seksyen 9 Bandar Semenyih, Daerah Ulu Langat, Selangor ('the land') to complete the sale of the land between Precise Avenue (M) Sdn Bhd and a Ismail bin Kamari.

[8] The respondent then acted for Precise Avenue (M) Sdn Bhd but the sale of the land to Ismail bin Kamari was aborted.

[9] The respondent did not send an invoice/ bill of costs to Precise Avenue (M) Sdn Bhd for the legal services rendered.

[10] By reason of the urgency of Precise Avenue (M) Sdn Bhd to resell the Land, the appellant on 20 August 2009 issued the letter of undertaking to the respondent to procure the issue document of title of the land. The respondent wanted security for his fees for services rendered to Precise Avenue (M) Sdn Bhd before releasing the issue document of title of the land.

[11] The letter of undertaking read as follows:

> I, Zainol @ Zainol Abidin bin Mohamed I/C 580711–02–5647 hereby acknowledge receipt of the original copy of the abovementioned title.
>
> I will undertake to pay Mr Lee Lim Huat I/C _____ the sum of RM200,000.00 on the disposal of the abovementioned property.
>
> Signed
>
> Zainol @ Zainol Abidin bin Mohamed
>
> Signed
>
> Witness: Liew Hock Seng
>
> Date: 20/08/09

[12] The respondent thereafter released the issue document of title of the land to the appellant and the land was subsequently sold by Precise Avenue (M) Sdn Bhd to a third party.

[13] By reason of the appellant's refusal to pay the respondent as per the letter of undertaking, the respondent commenced the suit in the Shah Alam sessions court and judgment was obtained against the appellant.

CONTENTION OF THE PARTIES

[14] As far as the respondent was concerned, it was a straightforward case of breach of undertaking.

[15] The appellant however principally contended here and below that the letter of undertaking was given without consideration. Besides, the letter of undertaking was procured under economic duress as well as through undue influence.

FINDINGS OF THE COURT

[16] It is trite that an appellate court will not generally disturb the findings of the trial court. In the court of appeal case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, Gopal Sri Ram JCA (as he then was) said:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.
>
> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or reject the evidence test it against the relevant criteria. *Thus, he must take into account the presence or absence of any motive that a witness may have in giving evidence. If there are contemporary documents, the he must test the oral evidence against these. He must also test the evidence of a particular witness against the probabilities of the case.* A trier of fact who makes findings based purely upon the demeanour of witnesses without undertaking a critical analysis of that witness evidence runs the risk of having his findings corrected on appeal ... . (Emphasis added.)

More recently, Mohd Zawawi Salleh JCA in the court of appeal case of *Bank Pertanian Malaysia Bhd (previously known as Bank Pertanian Malaysia) v Nora'rifah bt Darus* [2014] 6 MLJ 870; [2014] 7 CLJ 631 said at p 877 (MLJ); p 640 (CLJ):

> At the outset we must say that the jurisdiction of the appellate court to intervene with the finding of facts by a trial judge is well defined in catena of decisions by our courts. *It has been settled that an appellate court can intervene with the finding of facts when the findings are grounded entirely on speculations, surmises or conjectures; when an inference made by a trial court from its factual findings is plainly wrong, absurd or illogical; where there is none or insufficient judicial appreciation of evidence; when the findings of a trial court run contrary to the admission of the parties to the case, or fail to notice certain relevant facts which if properly considered, will justify a different conclusion; when the findings of fact are premised on the absence of evidence, or are contradicted by the evidence on record.* (Emphasis added.)

[17] From my reading of the grounds of judgment, the learned judge at para [10] found there was consideration in that the respondent released the issue document of title of the land to the appellant. The release in turn enabled Precise Avenue (M) Sdn Bhd to sell the land and the proceeds of the sale benefitted the appellant as majority shareholder of Precise Avenue (M) Sdn Bhd. The undertaking given by the appellant to the respondent in reciprocity was RM200,000 as security for fees for legal services rendered by the respondent to Precise Avenue (M) Sdn Bhd.

[18] I am mindful that there were cross contentions over the lien on the issue of document of title of the land by the respondent. The respondent relied on s 124 of the Contracts Act 1950 but the appellant argued that the lien could only arise if the invoice/bill of costs for work done has been rendered by the respondent. The debt only accrued upon rendering the invoice/bill of costs. The appellant in this regard relied on s 124 of the Legal Profession Act 1976 and the court of appeal case of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357 which approved the Indian Supreme Court case of *Shanti Prasad Jain v Director of Enforcement Foreign Exchange Act* 1962 AIR 1764 (SC) that a contingent debt is not a debt for purposes of s 124 of the Contracts Act 1950. In other words, a lien could not have arisen from a contingent debt.

[19] Strictly speaking the lien in my view, if any, could only be exercised by the respondent against Precise Avenue (M) Sdn Bhd and is therefore irrelevant vis a vis the appellant. The pleaded defence of the appellant wasn't however the giving of the undertaking on behalf of Precise Avenue (M) Sdn Bhd. Therefore the undertaking was a personal one given by the appellant to the respondent.

[20] Consideration is widely defined in s 2 of the Contracts Act 1950 which includes: '(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstain from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise'.

[21] At the time of the giving of the letter of undertaking, the respondent was in fact looking for security for his contingent debt from Precise Avenue (M) Sdn Bhd. This security must logically be in replacement of any lien, whether present or contingent, in the issue document of title of the land that would be lost if that title was released to the appellant or Precise Avenue (M) Sdn Bhd. It was also not the situation of a purported promise given in the performance of an existing duty as seen in the case of *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631 relied upon by the appellant.

[22] In the circumstances of the case herein, I agree with the learned judge that there was valid consideration. Applying the language of the Contracts Act 1950, the act of the respondent in having released the title was the consideration for the promise of the appellant as undertaken.

[23] The other contention of the appellant centered on economic duress and undue influence. As to economic duress, James Foong J (as he then was) in *Mohd Fariq Subramaniam v Naza Motor Trading Sdn Bhd* [1998] 6 MLJ 193 held at p 201:

In respect of economic duress, the plaintiff explains that if he did not sign P3 at the material time the defendants would not have released the taxi to him. This would lead to a deprivation of his livelihood. The Singapore case of *Third World Development & Anor v Atang Latief & Anor* (1990) 1 SCR 533 was cited in support. *To determine the extent of this doctrine of economic duress, Sinnathuray J in Third World Development limits it to 'unless it amounts to a coercion of his will which vitiates consent'. The principle to be applied in deciding this is an enquiry into whether the person alleged to be coerced did or did not protest; whether at the material time he did or did not have an alternative cause of action open to him such as an adequate legal remedy; a remedy that he was independently advised; and whether after entering the contract he took steps to avoid it; all quoted from a passage of Lord Scarman's judgment in Pao On v Lau Yiu Long* [1980] AC 614 *at p 635.* (Emphasis added.)

Furthermore in *OCBC Securities (Melaka) Sdn Bhd (formerly known as Sykt Tan, Chow & Loh Securities Sdn Bhd) v Koh Kee Huat* [2004] 2 MLJ 110 Low Hop Bing J (as he then was) after a detailed survey of the law said at pp 115–118 as follows:

[11] In Malaysia, our law of contract has been codified in the Contracts Act 1950 which did not specifically provide for duress as a defence. Section 15 thereof however incorporates the concept of coercion as a factor vitiating free consent which is essential in the formation of a legally binding and valid contract. Section 15 defines 'coercion' as 'the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement'.

[12] Apparently, the learned sessions court judge in his grounds of decision, specifically at p 66 of the appeal record, construed s 15 as including economic duress and applied it to the aforesaid facts of the case to conclude that the indemnity was thereby vitiated, on the basis of *Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 4 MLJ 331; *The Law of Contract In Malaysia And Singapore, Cases and Commentary* (2nd Ed) 253 et seq by Visu Sinnadurai J (as he then was); and *Schanka v Employment National (Administration) Pty Ltd and others* [2000] 170 ALR 42.

[13] At this juncture, it is appropriate for me to state that although s 15 does not provide for duress as a defence, in Malaysia the concept of duress and that of coercion have been used interchangeably. I shall therefore treat them as such here.

[14] In my judgment, the facts of the case obviously do not come within the ambit and purview of 'coercion' as defined in s 15 as there was no evidence of any committing or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, with the intention of causing any person to enter into an agreement. At p 516, Cheshire, Fifoot and Furmston's *Law of Contract* (2nd Singapore and Malaysian Ed) the learned author, Andrew Phang opined that the concept of economic duress is not encompassed within s 15.

[15] In *Teck Guan Trading*, the plaintiff agreed to sell round bars to the first defendant, Hydrotek Engineering the payment for which was guaranteed by the third and the fourth defendants. The price of the bars was disputed by the parties,

viz RM1,180 according to the defendants and RM1,244 as the plaintiff has alleged. Although the first defendant refused to pay the price at RM1,244, the first defendant later agreed as the plaintiff persistently refused to supply. The bars were delivered which the first defendant accepted. The plaintiff sent a notice of demand as a result of the defendants' failure to pay for the balance of payment for the bars. Before the registrar, plaintiff obtained summary judgment against the defendants whose counterclaim was also struck out. The defendants appealed against the decision, alleging that on the facts, there was an inference of, inter alia, coercion with reference to 'economic blackmail'.

[16] Ian Chin J held that s 15 defined only two ways of committing coercion and on the facts concluded that there was no question of coercion being committed on the first defendant. The learned judge added that the contention of 'economic blackmail' as 'economic duress' under English law was not applicable as the parties were dealing with each other at arm's length, following the doctrine of economic duress in English law as stated by Lord Scarman of the Privy Council in *Pao On & Ors v Lau Yiu Long & Ors* [1980] AC 614, in the following words:

> Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in *Occidental Worldwide Investment Corporation v Stobs A/S Avanti* [1976] 1 Lloyd's Rep 293 at p 336 that in a contractual situation commercial pressure is not enough. There must be present some factor 'which could in law be regarded as a coercion of his will so as to vitiate his consent'. This conception is in line with what was said in this Board's decision in *Barton v Armstrong* [1976] AC 104 at p 121 by Lord Wilberforce and Lord Simon of Glaisdale — observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v Homer* [1915] 3 KB 106, relevant in determining whether he acted voluntarily or not.

[17] The above judgment of Ian Chin J read together with *Pao On*, do not seem to support the respondent's contention based on 'economic duress'.

[18] In *Perlis Plantation Berhad v Mohamad Abdullah Ang* [1988] 1 CLJ 670, duress was raised as a defence. In considering this defence, VC George J (later JCA) held that the defendant should be able to show that his consent to the agreement he had entered into was not free in that such consent was caused by coercion as defined by s 15 and that our Contracts Act 1950 did not provide for any other form of coercion other than as defined by s 15.

[19] Duress was one of the defences raised in *Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd* [1988] 3 MLJ 346 in order to avoid a written sale and purchase agreement of shares, but the exact acts of duress were not divulged. In any event, the alleged duress which was said to have been applied prior to the agreement was subsequently completed without any protest, as a result of which VC George J (later JCA) held, inter alia, that this did not show that the duress defence was made bona fide and hence lacking in merit in that it can be said to be frivolous and vexatious.

No reference was made to any provisions of the Contracts Act 1950.

[20] In *Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal* [1992] 2 MLJ 734 (SC), in the court of first instance, the learned judge found that the first debenture was void as it was signed as a result of economic duress within the meaning of *Pao On*, and *A Zee Lobb (Garages) Ltd & Ors v Total Oil GB Ltd* [1983] 1 All ER 944. On appeal, the Supreme Court through the judgment of Edgar Joseph Jr SCJ (as he then was) held that the first debenture was not void but voidable, at the instance of the developer and not the contractor who was not a party thereto. However, no provision in the Contracts Act 1950 had been referred to.

[21] The defence of duress was pleaded in *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd* [1993] 2 MLJ 224 (SC), but there was no evidence to support the defence. Hence, the trial judge and the Supreme Court made a concurrent finding rejecting the defence of duress. However s 15 was not referred to.

[22] In Mohd Fariq *Subramaniam v Naza Motor Trading Sdn Bhd* [1998] 6 MLJ 193 (HC), the plaintiff explained that if he did not sign P3 which was a variation to the agreement for operation of taxis, the defendant would not have released the taxi to him, thereby depriving the plaintiff of his livelihood. James Foong J held that the plaintiff made no protest of any form or manner either before or after P3 was executed that he was coerced into executing it, as a result of which the defence of economic duress was not sustained. The learned Judge followed the judgment of the Singapore Court of Appeal in *Third World Development Ltd and Anor v Atang Latief and Anor* [1990] 1 MLJ 385 (CA) Singapore which in turn referred to *Pao On*, and held that assuming that there was some pressure — commercial pressure — exerted on the appellant at the time of his execution of the undertaking, such pressure does not constitute economic duress unless it amounts to a coercion of his will which vitiates consent. However s 15 was also not referred to in *Mohd Rafiq*.

[23] Sections 15 and 73 were specifically considered by Eusoff Chin J (later Chief Justice Malaysia) in *Chin Nam Bee Development Sdn Bhd v Tai Kim Choo & 4 Ors* [1988] 2 ML J 117 (HC). The dispute related to the payment of an additional sum of RM4,000 by each of the respondents (the plaintiffs in the magistrate's court) to the appellant (the defendant) pursuant to a sale and purchase agreement to purchase a house each at RM29,500. The magistrate found that the payment was not voluntary but made under a threat by the appellant to cancel the respondents' booking for their houses. There was a protest by the respondents over the payment. The magistrate ordered the refund of the RM4,000 to the respondents and on appeal the order was affirmed by Eusoff Chin J (later Chief Justice Malaysia) who applied ss 15 and 73 of the Contracts Act 1950. The eminent and learned judge rejected the appellant's contention that the threat to cancel the bookings of the houses did not amount to coercion as defined under s 15. His Lordship further considered s 73 which, where relevant, reads as follows:

[24] His Lordship followed the Privy Council decision in *Kanhaya Lai v National Bank of India Ltd* [1913] ILR Vol XL (Calcutta series) 598 and held that the word 'coercion' in the context of s 73 should be given its ordinary and general meaning, while the definition of coercion in s 15 should only apply for the purpose contained in s 14 which regulates free consent.

[25] From all the aforesaid authorities in which the concept of duress, including

economic duress, has been enunciated, the following principles may be culled:

(1) *our courts are slow in invoking the concept of duress as defined in s 15 or to import the concept of economic duress unless there is positive evidence to that effect, which must satisfy the guidelines given by the Privy Council in Pao On;*

(2) *the defence of duress or economic duress must be such as to vitiate free consent in order to render a contract voidable;*

(3) the concept of coercion as defined in s 15 cannot be equated with that in s 73 in which the word 'coercion' should be given an ordinary and general meaning; and

(4) section 73 requires a person to whom money has been paid under coercion to repay or return it. (Emphasis added.)

[24] I thus also agree with the conclusion of the learned judge in para [14] of her grounds of judgment that the appellant had not sufficiently proven that he was subjected to economic duress at the material time of the giving of the undertaking. The urgency per se of the appellant in wanting the issue document of title is not good enough to sustain the defence. I also observed that the appellant did not protest whilst giving the undertaking. The alternative cause of action open to him was to cause Precise Avenue (M) Sdn Bhd to sue and apply for a mandatory injunction against the Respondent to procure the title of the land. Also after having given the undertaking, the appellant did not take any step to avoid it save for his refusal to pay. These were actions required of the appellant based on the *Pao On* guidelines.

[25] The other defence of the appellant was that of undue influence of the respondent. Undue influence is defined in s 16 of the Contracts Act 1950 as follows:

(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. (Emphasis added.)

[26] In the court of appeal case of *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd & Ors* [1996] 1 MLJ 309, Siti Norma Yaakob JCA (as she then was) said at p 322:

> The principle behind the equitable doctrine of undue influence is expressed most aptly by Lindley LJ in the case of *Allcard v Skinner* (1887) 36 Ch D 145 at pp 182–183 to be as follows:
>
> Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people? *In my opinion, the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction … It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.* (Emphasis added.)

[27] On this aspect, I find that the learned judge has in para [14] of her grounds of judgment misdirected herself for failing to ask and consider the right questions on the facts and circumstances of the case. This misdirection warrants appellate intervention such as in *Oh Cheng Lim v Lim Eam Wooi* [1988] 2 MLJ 120 where Edgar Joseph Jr J (as he then was) reversed the findings of the learned magistrate by reason that the trial court had proceeded on the mistaken basis of the law and misdirected itself on the facts on the evidence.

[28] I noted that there was conflicting evidence of the respondent and Liew Hock Seng versus that of the appellant as to who asked for the furnishing of the letter of undertaking. The respondent's position was that the appellant volunteered it whilst the appellant's position was that it was initiated by Liew Hock Seng on the behest of the respondent. They were not critical in my view anyway.

[29] More importantly, the learned judge failed to appreciate the special relationship amongst the parties. The respondent was the solicitor of Precise Avenue (M) Sdn Bhd wherein the appellant was the alter ego. The respondent was also earlier the solicitor of Liew Hock Seng. Both the appellant and Liew Hock Seng were directors of Precise Avenue (M) Sdn Bhd. In the circumstances, the respondent was effectively in a position of authority over the appellant besides being in a fiduciary relationship with the appellant. Both

Liew Hock Seng and the appellant were in fiduciary relationship with Precise Avenue (M) Sdn Bhd and with each other too.

[30] As seen in paras [17] and [18] hereinabove, the fees of the respondent for legal services rendered to Precise Avenue (M) Sdn Bhd were not legally due as a debt in the absence of any invoice/bill of costs issued. There was no justification for any lien over the issue document of title of the land. The appellant albeit educated would not be aware of the legal intricacies whether the respondent has a valid solicitor's lien at the material time. He was influenced by the respondent through Liew Hock Seng that the replacement security by way of the letter of undertaking was necessary to discharge the lien. In fact Liew Hock Seng as the intermediary might have also been in conflict of interest for having acted in the interests of the respondent and possibly himself rather than Precise Avenue (M) Sdn Bhd or the appellant. It was natural for the appellant to trust both of them that resulted in him giving the undertaking to his own personal detriment. I therefore find it unconscionable by reason that the appellant was misled by the respondent and Liew Hock Seng. In this situation, it was for the respondent to rebut the presumption of undue influence but he has in my view failed to do so at the trial.

CONCLUSION

[31] In the premises, I find and hold that the appellant had appropriately invoked the defence of undue influence to vitiate the letter of undertaking. The proper remedy of the respondent in my view is to submit a bill of costs and claim for services rendered against Precise Avenue (M) Sdn Bhd. Accordingly, I allow the appeal and set aside the judgment of the sessions court dated 12 June 2014. The costs here of RM7,500 and costs below are to be borne by the respondent.

Appeal allowed and sessions court's decision set aside.

Reported by Ashok Kumar